IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

OMP(M) No. 103 of 2001.

Judgement reserved on : 22.3.2007.

Date of decision: 30.3.2007.

Union of India ….. Petitioner.

Vs.

M/s Raymus Porta Buildings Ltd. …. Respondent.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the petitioner: **Mr. Sandeep Sharma, Assistant Solicitor General of India.**

For the Respondent : **Mr. Ajay Kumar, Advocate.**

Surjit Singh, Judge.

These objections, under Section 34 of the Arbitration and Conciliation Act, 1996, have been filed by the Union of India, against the award dated 30.5.2001 of the Arbitrator, with regard to Claims No. 1, 2 and 4. Prayer has been made for setting aside the award with regard to the aforesaid three claims.

2. Relevant facts may be summed up thus. Executive Engineer, Shimla Central Division No.1, C.P.W.D., invited tenders for certain pre-fabricated structures. Respondent was one of the tenderers. The rates quoted by him and one more party were found to be lower than the rates quoted by other tenderers. One of the conditions of the tender, i.e. Condition No. 3 of the Special Conditions

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Whether the reporters of the local papers may be allowed to see the Judgment?

was that in case the consumption of the quantity of the steel was found to be less than the quantity indicated in the work schedule, recovery at the rate of Rs. 16,000/-, per ton, would be made from the contractor. The respondent did not specify the quantity of the steel, which he was to use in various types of structures. The tenders were opened on 1.10.1994. It was then that the Executive Engineer noticed that quantity of steel to be used in various items of work had not been specified by the respondent. So the respondent was called upon to specify the quantity of steel to be used by him for various items of the work. He, vide letter dated 25.10.1994, specified such quantities in respect of each item of work. Thereafter negotiations were held with the respondent and the other tenderers, whose rates were found to be lower than those quoted by others. Some correspondence was exchanged with regard to those negotiations. Respondent offered to reduce the rates initially quoted by him. Such rates having been found to be the lowest, work was awarded to him, vide letter dated 22.3.1995.

3. On completion of the work, respondent submitted final bill. He was called upon to intimate the quantity of steel used by him for each item of work to enable the Executive Engineer to verify whether the quantity used by him was as per agreement. He submitted details of the quantity of steel used by him for each item. The quantity used by him was found to be lower than the quantity, which he offered to use, vide letter dated 25.10.1994. Accordingly, Special Condition No. 3, referred to above was invoked and a sum of

Rs. 8,12,266/- was worked out as the amount recoverable from the respondent. The final bill of the respondent was not cleared.

4. The dispute having arisen on this score, the matter was referred to Arbitrator in terms of the agreement. The respondent claimed that a sum of Rs. 5,59,759.28P was due to him. Later on the amount was raised to Rs. 6,00,838.08P on account of the value of bolts. After the claim was preferred, the Executive Engineer released a sum of Rs. 1,05,902/-. So the respondent reduced the amount of his claim to Rs. 4,94,936/-. The respondent also claimed interest at the rate of 24% per annum, from the date of the completion of the work to the date of the payment of the amount. A sum of Rs. 2,88,084/- was claimed by him on account of extra work. Another sum of Rs. 5,00,000/-, was claimed on account of money withheld on the plea that there were some defects in the work.

5. The Union of India (the petitioner) claimed that a sum of Rs. 8,12,266/- was due from the respondent on account of use of lesser quantity of steel. Some other counter claims were also made.

6. The Arbitrator, vide award dated 30.5.2001, held that the respondent was entitled to a sum of Rs. 4,11,932.28 paise on account of balance payment (Claim No.1) and was also entitled to simple interest at the rate of 14% per annum on this amount from 31.12.1996, the date of invocation of Clause 25 (regarding arbitration) and future interest at the rate of 18% per annum. He was also held to be entitled to a sum of Rs. 36,018.16P on account of extra work carried out by him. As regards the claim of Rs. 5,00,000/- for withholding the amount for the alleged defects in the work, the

Arbitrator awarded Rs.3,076,832/-. Counter claims of the petitioner were rejected.

7. The petitioner felt aggrieved by the award, particularly, the rejection of its counter claim for recovery on account of consumption of lesser quantity of steel and allowing of the claim of the respondent for the balance amount, i.e. his Claim No. 1, as also the award of interest on the said amount. It was alleged that the award was not inconsonance with the provision of Section 31 and was also in violation of the provisions of Sections 16 and 20. Further it was alleged that the Arbitrator had gone beyond the scope of agreement. It was also alleged that the contractor was not a Private Limited Company and hence, the dispute could not have been referred by it to the Arbitrator. The respondent in his reply to the objection petition alleged that the objections were not maintainable, under Section 34 of the Arbitration and Conciliation Act.

8. This court framed the following issues.

1. Whether the impugned award is not inconsonance with the provisions of Section 31 of the Arbitration Act, if so, its effect? OPP.

2. Whether the impugned award is in violation of the provisions of Indian Contract Act with special reference to Sections 16 and 20 thereof, if so, its effect? OPP.

3. Whether the Arbitrator has gone beyond the scope of agreement, if so, how and its effect? OPP.

4. Whether the objections filed by the petitioner are maintainable under Section 34 of the Arbitration and Conciliation Act, 1996? OPP

5. Whether the Contractor is not a private Limited Company, as alleged, if so, its effect? OPP.

6. Relief.

9. I have heard the learned counsel for the parties and gone through the record. Parties were permitted to lead evidence on affidavits. Parties do not dispute the facts. The only point over which the dispute is there between the parties is whether the letter dated 25.10.1994, written by the respondent to the petitioner specifying therein the quantity of steel to be used for each item of the work mentioned therein is part of the tender/ agreement between the parties, and as such, the respondent was bound to use the quantity of steel, as mentioned in the said letter. It is not in dispute that the quantity of steel used is less than the quantity specified in the aforesaid letter dated 25.10.1994. Therefore, the affidavits filed by the parties by way of evidence are immaterial for returning the finding on the aforesaid issues.

10. The findings on the issues are as under:-

Issue No.1.

11. The Arbitrator has held that the letter, dated 25.10.1994, is not part of the tender/ agreement and this is the reason which he has given for rejecting the counter claim of the petitioner, as also its plea that it is entitled to effect recovery at the rate of Rs.16,000/- per ton of the steel required to be used by enforcing Special Condition

No.3, of the tender. Under these circumstances, it cannot be said that the award of the Arbitrator is not inconsonance with the provision of Section 31 of the Arbitration and Conciliation Act, which says that the award has to be a speaking one. Whether the reason given by the Arbitrator is valid or not is a different matter, but the fact remains that he has given the reasons and therefore, it cannot be said that the award is not in conformity with the provision of Section 31 of the Act. Hence, the issue is answered against the petitioner.

Issue No.2.

12. No argument qua this issue was advanced on behalf of the petitioner, during the course of the hearing. So this issue is also found against the petitioner.

Issues No. 3 and 4.

13. It was submitted by the learned Assistant Solicitor General of India, appearing on behalf of the petitioner, that when the tenders were opened on 1.0.1994 and it was noticed that though the rates quoted by the respondent and one Mr. Khullar were lower than the rates quoted by other tenderers, the respondent had not specified the quantity of steel, which was to be used by him for various items of work and, therefore, he was called upon to specify the quantity of steel in respect of each item of work and responding to such demand, he submitted the detail of steel, which was to be used by him for each item of work, vide letter dated 25.10.1994 and thus this letter and the detail are part of the tender/ agreement. He submitted that after the receipt of this letter dated 25.10.1994, negotiations were held with the

respondent and some other tenderers and ultimately the work was awarded to the respondent, vide letter dated 22.3.1995.

14. Countering the aforesaid submission made on behalf of the petitioner, learned counsel for the respondent argued that in the letter of award of work dated 22.3.1995, Ex. C-6, there was no mention of the letter dated 25.10.1994, though some other letters dated 28.2.1995 and 23.12.1994 had specifically been stated to form the part of the agreement. The Arbitrator has held that the letter dated 25.10.1994 is not part of the tender/ agreement, because in the letter of award of work Ex. C-6, it is not mentioned that it forms the part of the agreement. In other words, the contention of the respondent has been accepted by the Arbitrator.

15. The view taken by the Arbitrator is not correct. As a matter of fact, from the material on record and the background in which letter dated 25.10.1994 was written by the respondent, the view taken by the Arbitrator is not possible. Admittedly, Special Conditions, appearing at page-137, of the agreement, were part of the tender/ agreement. It may be stated here that all the terms and conditions of the tender were treated as part of the agreement and therefore, term “tender/agreement” is being used in this judgement for the agreement. As per Condition No.3 of the Special Conditions at page- 137, recovery was agreed to be effected at the rate of Rs.16,000/- per ton of steel in the event of the quantity of steel used, being found less than the quantity specified in the work schedule. In the tenders submitted by the respondent, quantity of steel which was to be used for various items of work had not been specified. Ex. C-11,

the letter dated 25.10.1994, itself shows that details of the quantity of steel were submitted by the respondent to the petitioner, as per latter's desire. The fact indicates that since the quantities were not mentioned in the tender submitted by the respondent, he was required to state the same and therefore, the quantities specified by him in the detail Ex. C-11, attached with letter Ex. C-11, were to be treated as part of the tender/ agreement. There was no need for making a mention of this letter or the detail of quantity attached therewith, in the letter of award of work. In the letter of award of work, reference is made only to those two letters, which pertain to the negotiations held between the parties and the reduction of the rates initially quoted by the respondent to the extent mentioned in the said letters. Admittedly, the negotiations were held after the letter Ex. C-11 dated 25.10.1994 was submitted by the respondent. This letter and the detail attached therewith having provided for the information found missing in the tender, which was required to be supplied to meet the requirement of Special Condition No.3, automatically became part of the tender. The view taken by the Arbitrator that this letter and the detail submitted therewith having not been referred to in the letter of award of work cannot be treated as part of the tender/ agreement, is perverse. The Arbitrator having not treated this letter and the detail submitted therewith as part of the tender/ agreement, has acted illegally and beyond the scope of the agreement and thus his award is against the public policy of India within the meaning of Section 34(1)(b)(ii) of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court in **Oil and Natural Gas Corporation Ltd**. vs.

SAW Pipes Ltd. [AIR 2003 SC 2629] has held that an award which is contrary to the terms of agreement is patently illegal and such an illegality would fall within the mischief of being in conflict with the public policy of India and hence it will be liable to be set-aside, under Section 34.

16. As a result of the above discussion, both the issues are answered in favour of the petitioner.

Issue No. 5.

17. Learned Assistant Solicitor General of India did not make any submission with respect to this issue. So the same is found against the petitioner.

Relief.

18. In view of the findings on Issues No. 3 and 4, the award of the Arbitrator with respect to Claims No. 1 and 2 of the respondent and counter-claim No.1 of the petitioner, is set-aside. The petition stands disposed of accordingly.

March 30, 2007. **(Surjit Singh)**
(*Hem*) **Judge.**